

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 28, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-1886-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

PAUL D. HOPPE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County:
RICHARD REHM, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 VERGERONT, J. The State of Wisconsin appeals the trial court's order granting Paul Hoppe's motion to suppress all statements he made to City of Portage police officers in connection with their investigation of the death of Jacqueline Simon, Hoppe's girlfriend. The statements were made in three

interviews conducted on three consecutive days while Hoppe was in the hospital. After the third interview, Hoppe was charged with first-degree reckless homicide contrary to WIS. STAT. § 940.02(1) (1999-2000)¹ in Simon's death. The trial court granted Hoppe's motion, concluding that the statements were given involuntarily. We agree and therefore affirm.

BACKGROUND

¶2 Three police officers went to Hoppe's apartment shortly after 6:00 p.m. on Saturday, March 6, 1999, in response to a report of a possible death. Hoppe was in the living room seated on the couch and Simon's body was on the floor next to him. Hoppe's speech was slurred and he was shaking so badly he was not able to walk on his own. The officers had to physically help him stand up and walk, one on each side, holding him. Officer Claude Thompson testified Hoppe was not physically able to leave the apartment on his own. He knew Hoppe from several previous contacts and thought Hoppe was intoxicated. The officers called an ambulance and Officer Thompson followed the ambulance to the hospital.

¶3 At the hospital Hoppe was placed in an exam room in the emergency room. Officer Thompson remained in the room with Hoppe. The medical staff told the officer that a test showed Hoppe had no alcohol in his system and that he was being treated intravenously and was responding. Officer Thompson noticed that Hoppe's speech improved. Officer Thompson told Hoppe he was not under

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

arrest and that he wanted to talk to him about some “suspicious things he had seen at ... [Hoppe’s] apartment.” Hoppe said he would talk to him.

¶4 While Hoppe was still in the exam room, Captain Kenneth Manthey, who had been at Hoppe’s apartment and was the officer in charge of the investigation, and Detective Mark Hahn arrived at the hospital. They both told Hoppe he was not under arrest. Detective Hahn told Hoppe he was there to continue investigating the incident that had occurred at his apartment. Captain Manthey read Hoppe the search warrant for his apartment. When the officers learned from the medical personnel that Hoppe would be staying overnight in the hospital, Captain Manthey asked Hoppe if they could talk to him after he was moved to a private room, and Hoppe said yes. Neither Detective Hahn nor Captain Manthey asked medical personnel whether Hoppe was in a condition to be interviewed.

¶5 Nurse Bonnie Julson, who was responsible for Hoppe’s care beginning at 11:30 p.m. on March 6, testified that Hoppe was “vomiting [had] tremors and [was] gray-looking.” He was not getting enough oxygen, his heart rate was “zipping along,” and he was “breathing fast and shallow.” His SSA (selective severity assessment) was twenty-one, which is high.² A Librium protocol was ordered for Hoppe. Librium is a tranquilizer and is used to treat impending delirium tremors (DTs), which is a condition caused by alcohol withdrawal. Nurse Julson testified that Librium is usually started with an SSA of ten and over, and “definitely he needed something.” She testified that DTs,

² The Selective Severity Assessment Flow Sheet filled out by the attending medical personnel several times each day during Hoppe’s stay in the hospital measures his eating, tremor, sleep, sensorium, hallucination, awareness, agitation, sweats, temperature, and pulse.

agitation, and convulsion can begin within twenty-four to seventy-two hours of not having had a drink, “[s]o it’s real important that you start the Librium as soon as possible to keep that patient in the safety zone.” Patients who need this treatment and do not receive it could have seizures or go into a coma. The side effects of Librium are confusion, weakness, lethargy, and difficulty walking.

¶6 Nurse Julson testified she had the Librium in her hand and was going to give it to Hoppe, who was by then in a private room, when an officer asked her not to give it to Hoppe because he did not want to fog up Hoppe’s mind while he questioned Hoppe. She was concerned about withholding the medication, but she wanted to cooperate with the officers and she did not feel it was imperative that she administer it right then in view of the officer’s request. She waited until the interview was over to give Hoppe the Librium.

¶7 Captain Manthey began the interview at midnight on March 6 and ended at 1:14 a.m. on March 7, with Detective Hahn present. The interview was audio recorded. In the interview Hoppe said the day was Friday, when in fact it was Sunday. In response to Captain Manthey’s questions, Hoppe described in detail, often confusing and conflicting, his and Simon’s activities on Saturday. He denied harming her. Initially he said that he found Simon dead at about 4:15 or 4:00 p.m. when he was alone; later he said he first found her along with some guys who helped him into his house after he had gone to the Party House and had six beers. He insisted he had had six beers even when Captain Manthey told him his blood alcohol level was .00. During the interview Hoppe signed a consent form permitting Captain Manthey to administer a voice stress test. Captain Manthey explained that for control questions, he needed Hoppe to answer two questions falsely, and he told him what the false answers were. However, Hoppe answered the two questions truthfully; Captain Manthey explained again what he was to do,

Hoppe answered the questions truthfully again; and, after the third explanation, Hoppe gave the false answers as he had been instructed. At the end of the interview Hoppe answered “yes” to the question of whether he would be willing to talk to the officers later, and “no” to the questions of whether the officers had made any threats to him and whether he had any complaints about the way they had handled him.

¶8 Doctor Frederick Bronson, who treated Hoppe while he was in the hospital, saw him at approximately 9:00 a.m. on March 7 and was his treating physician thereafter until March 12. His diagnosis was that Hoppe was suffering from chronic alcoholism, alcohol withdrawal, threatened delirium tremors, dehydration, electrolyte imbalance, and chronic brain syndrome secondary to alcohol abuse. Bronson testified that Hoppe was confused for the first three or four days of his hospital stay as to where he was and why he was there; his assessment of Hoppe, based on talking to him and without undertaking a psychometric analysis, was that he was “totally out of it” for several days, and after that he started improving every day. The Librium was continued until March 10, with the dosage tapering over time and according to his SSA level.

¶9 Captain Manthey and Detective Hahn returned to Hoppe’s hospital room on March 8 at 2:15 p.m. Captain Manthey did not talk to any medical personnel about Hoppe’s condition before he began this interview. Captain Manthey began the interview by reminding Hoppe he had said they could come back and talk to him if they needed to, and Hoppe agreed this was correct. Hoppe said no when asked if he was taking any medication.

¶10 The officers now knew that an autopsy showed Simon had died from a blow to the back of her head, and Captain Manthey told Hoppe this during the

interview. Many questions focused on what Hoppe and Simon had done Friday evening in his apartment and whether they had an argument that night. Hoppe gave a number of details, some conflicting, about their activities Friday evening; he eventually admitted they had an argument, but answered no to repeated questions about hitting or pushing Simon and insisted she was alive Saturday morning. At one point, he said he never made it to the tavern on Saturday, but only got as far as the mailbox before he fell down; he said he did not have six beers, but had snuck brandy from a bottle Saturday morning while Simon was in the shower. However, a short time later he said he had gone to the tavern and had six beers.

¶11 During this interview Hoppe's voice was slurred, he spoke slowly, and there were often pauses before he answered. At several points he closed his eyes and did not answer, and Captain Manthey repeated the question. The tape and transcript show that Captain Manthey believed that at least some of the times when Hoppe closed his eyes, he had dozed off.

¶12 During the interview, after explaining why Simon's daughter needed the keys to Simon's apartment and why they thought the keys might be in Hoppe's apartment, Captain Manthey asked Hoppe if they could go to his apartment to get the keys. Hoppe answered that it was okay for them to go to Simon's apartment for the keys; he had to be reminded that they were asking permission to go to his apartment. He agreed they could do that. At the end of the interview, when Detective Hahn reminded him that he had given consent for them to go to his apartment to try to find Simon's keys, Hoppe said "no ... her house" and again had to be reminded it was his apartment they wanted to check.

¶13 Dr. Timothy Hayes, a psychologist experienced in treating alcoholics, came to see Hoppe during this interview and was told to come back later. He returned at 5:00 p.m. He had reviewed Hoppe's medical records. He observed that Hoppe was in a somewhat delirious state, coming in and out of consciousness, having difficulty concentrating, his physical condition was rather poor, and he had difficulty walking. Hoppe's speech was slightly slurred, he "had difficulty tracking some of the questions and would frequently tangent." He had short-term memory impairment, not remembering anything after a five-minute recall, and there was some impairment in abstract reasoning, judgment, and problem solving abilities. Hoppe made statements to him that indicated either a hallucination or a delusion. Dr. Hayes testified that hallucinations are a symptom of alcohol withdrawal.

¶14 Hoppe's former wife visited him at 8:30 p.m. on March 8 for twenty minutes and testified that he was lethargic, had a tendency to keep falling asleep, and sometimes stared without answering; his motor movements were delayed and his speech was slow.

¶15 Nurse Julson attended Hoppe overnight on March 8-9. She testified that at 1:00 a.m. on March 9, Hoppe was confused, although he was oriented to person, time, and place. An example of his confusion was that he wanted to get some work done on his glasses and said maybe his girlfriend could give him a ride. The nurse had to remind him Simon was dead. His SSA had improved, meaning decreased, and his vital signs were stable; but his SSA did increase later on March 9.

¶16 The nurse who attended Hoppe during the day on March 9 testified that he was disoriented either as to time of day or the date and drifted off slightly,

sometimes focused and sometimes not. In the morning Hoppe asked her where Simon was and he was unable to pick up a glass; he spilled the glass all down his front and did not react. Later she heard him talking when no one was in the room with him. After that, at approximately 1:15 p.m., the officers arrived and asked her to put Hoppe in a chair so that he would stay awake a little better, and it took two people to get him up and into a chair since he was very unsteady on his feet.

¶17 The third interview, again conducted by Captain Manthey, began at 1:56 p.m. and concluded at 3:57 p.m. on March 9. Hoppe thought it was Monday rather than Tuesday. By this time the officers had determined Hoppe was not at the Party House on Saturday. In response to Captain Manthey's assertion—repeated three times before Hoppe responded—that Hoppe had not told the truth when he said he had six beers at the Party House on Saturday, Hoppe agreed it was not the truth. Hoppe responded to the question why he told them he was at the Party House by saying he “needed an alibi.” At a later point he said he could not remember whether all the details he related about his and Simon's activities on Saturday were a lie or not. When Captain Manthey told Hoppe that it appeared Simon was dead all day Saturday and had died possibly on Friday, Hoppe initially continued to say he believed she died on Saturday. However, by the close of this interview, Hoppe admitted that on Friday he and Simon had an argument, she hit him and called him a “drunken old bum,” he “saw red,” he hit her a number of times, and, after she fell to the floor, he kicked her a number of times, once to the head. Hoppe initially said that during the argument Simon got in her car and drove away and he got in his car and followed her, but when Captain Manthey said that could not be correct because the neighbors said the cars had not moved that day, Hoppe assented to that. He continued to insist, as he had in the first two

interviews, that Simon was wearing red shorts and a striped top when she died, although Captain Manthey learned she had not been wearing that.

¶18 At the end of this interview Hoppe answered yes to the question of whether he understood he was not under arrest, and no to the question of whether any threats or promises were made. Hoppe's voice during this interview was slurred, though less so than on the preceding day.

¶19 Hoppe's former wife visited him on March 9 between 5:30 and 6:30 p.m. She testified that during this visit Hoppe insisted there was a woman lying in his bed snoring, and after she repeated a number of times there was no woman there, he indicated he realized no one was there. She recounted two other instances in that visit when Hoppe stated he saw something which his former wife testified was not there. Hoppe told her he had told the police Simon had been killed when they went to buy some alcohol; he was driving and went through a red light and another car struck theirs and killed her. When his former wife reminded him that he did not drive, he said a taxi cab had driven him to get alcohol, the driver helped him back into his apartment because he could not walk, and he found Simon dead.

¶20 During all three interviews the door was closed for the most part, and when any medical personnel came into the room the officers stopped the interview while they attended to Hoppe. When Hoppe needed to go to the bathroom, he was assisted by a nurse. Captain Manthey helped him drink water and wipe his mouth.

¶21 Captain Manthey acknowledged Hoppe was confused about some things in the interviews, but said he was not about other things. He described Hoppe's condition in the second interview as "the worst." After the second

interview, he testified, he consulted with Dr. Hayes about Hoppe's condition because "[he] was worried because on Tuesday (March 8) [Hoppe] was groggy. And so [he] wanted to find out prior to talking the third time on Wednesday, someone in similar situations, how long would it take for this grogginess to wear away [sic]." According to Captain Manthey, Dr. Hayes told him it should clear up that day or the next, and, if it did not, he was going to order a CAT scan. Captain Manthey felt Hoppe had improved when he saw him on March 9 and therefore he went ahead with the interview. He did not consult with Dr. Hayes before the interview to see if Hoppe's mental status had improved, nor did he talk to Dr. Hayes or any other medical personnel about alcohol dementia or problems Hoppe might have with memory.

¶22 Captain Manthey agreed that at times he suggested certain scenarios to Hoppe and asked leading questions. For example, he repeatedly told Hoppe that he was with Simon when she died, and he repeatedly told Hoppe he was not being truthful and there was "deception" in his answer that he had not harmed Simon. He also agreed that on March 9 he brought up emotional topics in his questioning—such as Hoppe's service in Vietnam and the death he saw there, and how Simon's family was feeling and that they needed an answer—and he employed certain other techniques he had been trained to use in interviewing suspects. He acknowledged that his statement to Hoppe in the third interview that a witness saw Simon dead on Friday was not completely accurate. He told Hoppe that, although he could not make any promises, he would tell the district attorney if Hoppe cooperated, and he tells suspects this "to get the truth."

¶23 Dr. Hayes returned to see Hoppe on March 10 to see if the delirium had cleared and to make treatment recommendations. He noted Hoppe was no longer delirious, but he remained somewhat confused, had a problem with short-

term memory, and a condition called confabulation. Confabulation means that a person hides the things he or she cannot remember by adding details that sound logical but are not true, so that the listener cannot tell what is accurate and what is not without a secondary source. Dr. Hayes gave as an example that Hoppe said he remembered who Dr. Hayes was, but then could not say who Dr. Hayes was, and he said they had talked about two subjects which they had not talked about. Hoppe performed poorly on tests designed to check his judgment, reasoning, and problem-solving abilities. In Dr. Hayes' opinion, people are not willfully intending to deceive when they confabulate, but believe what they are saying is true. He testified that because of Hoppe's problem with short-term memory, when he is talking about something that happened within the last several months, one cannot be certain whether he is being accurate or making things up.

¶24 Before Dr. Hayes testified at the motion hearing, he reviewed the transcript of the three interviews. In his opinion Hoppe did not understand everything that was going on and what was in his best interests; he was not competent to consent to being questioned, and did not have the reasoning or the understanding to withdraw his consent to questioning. Because of the confabulation, Hoppe was susceptible to suggestions, meaning answering things in a certain way to please the questioner. Dr. Hayes did not conduct a full evaluation of Hoppe's mental condition for purposes of legal competence as he would for a competency hearing. Dr. Hayes' diagnosis of Hoppe's condition on March 8 and March 10 was dementia and alcohol delirium, the latter caused by alcohol withdrawal.

¶25 Dr. James Whitman, a psychiatrist experienced in treating alcoholism, reviewed Hoppe's medical records from admissions to a variety of facilities, reviewed the police reports and the transcript of the interviews, listened

to the tapes of the interviews, and interviewed Hoppe in October 1999. His diagnosis of Hoppe's condition from March 6, 1999, through March 9, 1999, was severe, chronic, end-stage alcohol dependence; alcohol-induced amnestic disorder (decreased memory function); alcohol-induced psychotic disorder including hallucinations and delusions; alcohol withdrawal delirium; and alcohol-related dementia (long-term decrease in cognitive functioning and memory which is present even after a person has recovered from alcohol intoxication and/or withdrawal, and which in Hoppe, in October 1999, was mild).³ In addition, at the time of Hoppe's admission to the hospital, he was found by his examining and treating physicians to be suffering from debilitation, a decrease in serum potassium and serum blood sugar, dehydration, and generalized weakness. These conditions in the aggregate, Dr. Whitman testified, produce a decrease in the ability of a person to track events that are occurring at the time.

¶26 In Dr. Whitman's opinion, Hoppe exhibited in the taped interviews several features of alcohol-induced delirium and gave responses indicating confabulation. He, like Dr. Hayes, explained that generally when a person confabulates he or she is intending to tell the truth. He said that assuming a person who is confabulating is trying to tell the truth and is trying to be cooperative, the likely result of being told he or she is lying is that the person would come up with a different answer, and that is what appeared to have happened in the interviews. He acknowledged that hypothetically when a person is confabulating, it is possible that some of the statements are true, some are confabulations, and some are lies.

³ Dr. Whitman explained that alcohol-induced amnestic disorder and alcohol-induced psychotic disorder are acute conditions relating to intoxication and withdrawal from alcohol, Hoppe's decrease in memory functioning due to chronic alcohol-induced dementia was mild, but his decrease in memory functioning on an acute basis due to intoxication or withdrawal from alcohol was much more severe, he testified.

In his opinion, Hoppe's competency to consent to questioning was impaired from March 6 to March 9 because of his delirium and disorientation; that is, his ability to comprehend his circumstances was substantially impaired. From his review of the transcripts and listening to the tapes, Dr. Whitman opined that Hoppe was susceptible to suggestion, responding to suggested scenarios by initially saying he did not know or could not remember, and then, when suggestions were offered repeatedly, eventually agreeing and even actively giving details. From Captain Manthey's comments to Hoppe at one point in the interview on March 8, he had the impression Hoppe was having an hallucination, but he did not know for sure.⁴

¶27 In its decision on the motion, the trial court first ruled Hoppe was not in custody and therefore *Miranda* warnings were not required. That ruling is not at issue on this appeal. The court then ruled that Hoppe's statements in the three interviews were not voluntary.⁵ After extensive review of the applicable case law, the court concluded that it had to look at Hoppe's characteristics, the conduct of the law enforcement officers, and the totality of the circumstances in which the questioning occurred. With respect to Hoppe's condition, the court accepted Dr. Hayes' and Dr. Whitman's testimony, as well as the other evidence of Hoppe's medical condition, including his former wife's testimony that he

⁴ The incident Dr. Whitman referred to was Captain Manthey's statement to Hoppe, "There's no one else here, Paul" indicating to Dr. Whitman that Hoppe believed someone else was in the room.

⁵ The court observed that although all three interviews were the subject of the motion, it believed the primary focus of the motion was on the third interview, which was the most significant. However, it stated, although Hoppe's incapacities were the same in all three interviews, the conduct of the police officers and the pressures they exerted were not the same in all the interviews. The court stated that if the State wished the court to consider whether Hoppe was entitled to suppression only of the second and third interviews and not the first interview, the State could raise that issue. As we understand the record, the State did not ask the court to consider that issue.

suffered from hallucinations. The court observed the State had not presented its own medical or psychological experts to the defense's evidence on Hoppe's mental and physical state. The court found Hoppe was very vulnerable and very susceptible, and, although his condition and symptoms were not the same over the three days, significant impairments existed throughout the three days and many were open and obvious to the law enforcement officers. The court found the impairment the doctors testified to was evident from listening to the tapes.

¶28 With respect to the officers' conduct, the court rejected the defendant's contention that the officers intended to isolate Hoppe, and it rejected the contention that withholding medication was a threat that medical treatment would be withheld, because of the motive for the request, because it was a short duration, and because the court found Hoppe did not know the request had been made.⁶ The court also did not agree with the defense that Captain Manthey lied to Hoppe regarding the facts surrounding Simon's death.

¶29 In analyzing the officers' conduct, the court observed that their conduct did not include "egregious actions which have often resulted in the suppression of statements given by defendants" in other cases. Specifically, the court found there were no threats, no force used or threatened, "[e]xcept for the initial request to withhold the first ... medication ... no threat to withdraw medical treatment," no explicit intimidation, no withholding of food or water, and no promises were made except for noting cooperation to the district attorney. The court found the tone and manner of the questioning was not harsh, although, it

⁶ Hoppe argues this finding is clearly erroneous because Nurse Julson testified she was going to put the Librium in Hoppe's mouth when the officer asked her not to, and Hoppe was awake at the time. We do not address this issue because we conclude the statements were not voluntary even if Hoppe did not hear Captain Manthey make this request.

“became much more direct and accusatory in the last of the three interviews.” The court noted Captain Manthey “appear[ed] to be uncommonly helpful to the defendant during the course of the interviews.”

¶30 The court then analyzed the officers’ conduct in the context of Hoppe’s condition:

Each period of questioning was not so long as to result in a finding of conduct which overcame voluntariness in and of itself. However, the periods of questioning could not be called brief. In addition, the aggregate time between the three sessions involved in interviews was five hours.

The first interview of Mr. Hoppe might be characterized as investigative. Law enforcement was faced with a death under unusual circumstances, and it was clear that Mr. Hoppe was in a position to know more than anyone else about the circumstances. As law enforcement obtained information from other sources and other – and over the course of the three interviews, the questioning of the defendant became more and more Corsica and accusative, especially, as I’ve noted, during the last interview. There was an increase in the use of psychological pressure by using emotional topics such as the death of the defendant’s parents, the concerns of the family of the deceased, prior military experience, and service in Vietnam.

There seemed to be no concern on the part of law enforcement regarding the mental capacities of the defendant. That is evidenced by their failure to make any inquiry of the medical staff regarding the defendant’s capacity to be questioned. And it is also evident by reason of the fact that law enforcement seemed to be insensitive to the very obvious impairments being demonstrated by Mr. Hoppe during the course of questioning. By reason of his impairment, the defendant was particularly susceptible to the techniques used in questioning, including the suggestion of fact scenarios surrounding the death of Jackie Simon. While these techniques, under different circumstances, might not be considered oppressive, they reach a different level because of the circumstances under which the questioning occurred and because of the characteristics being demonstrated by Mr. Hoppe.

¶31 The court's conclusion was that, considering the totality of the circumstances, the State had not met its burden of proving Hoppe's statements were voluntarily made.

DISCUSSION

¶32 Under the due process clause of the Fourteenth Amendment, confessions that are not voluntary are not admissible. *Rogers v. Richmond*, 365 U.S. 534, 540 (1961). When we review a trial court's determination on the voluntariness of a defendant's confession, we affirm the trial court's findings of historical facts unless they are clearly erroneous. *State v. Clappes*, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987). However, the application of the constitutional standard to historical facts is a question of law, which we review de novo. *Id.*

¶33 In deciding whether a confession is voluntary, we ask whether the confession was procured by coercive means or was the product of improper pressures exercised by the police; this is the focus of our inquiry because it is determinative of whether the inculpatory statement was the product of "free and unconstrained will, reflecting deliberateness of choice." *Id.* at 236 (quotation source omitted). In our inquiry we must determine whether the defendant was "the victim of a conspicuously unequal confrontation in which the pressure brought to bear on [the defendant] ... exceeded the defendant's ability to resist." *Id.* (quotation source omitted). We make this determination after looking at the totality of the circumstances surrounding the confession and balancing the personal characteristics of the defendant against the pressures imposed by the police to induce the defendant to respond to the questioning. *Id.* The personal characteristics to be considered may include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with police.

Id. These must be balanced against police pressures and tactics used to induce admission, such as the duration of the questioning, the general conditions under which the confession took place, any excess physical or psychological pressure brought to bear on the declarant, and any inducements, threats or other methods used to compel a response. *Id.* at 236-37.

¶34 Police coercion and a defendant's personal characteristics are interdependent concepts: the more vulnerable a person is because of his or her unique characteristics, the more easily he or she may be coerced by subtle means. *State v. Xiong*, 178 Wis. 2d 525, 534, 504 N.W.2d 428 (Ct. App. 1993). “As interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the voluntariness calculus.” *Id.* (citing *U.S. v. Connelly*, 479 U.S. 157, 164 (1986)).

¶35 The confession's truth or falsity has no direct bearing on the determination of voluntariness. See *State v. Agnello*, 226 Wis. 2d 164, 182, 593 N.W.2d 427 (1999). The State has the burden of proving voluntariness by a preponderance of the evidence. *Id.*

¶36 The State contends the trial court erred because it focused too much on Hoppe's mental impairments without fully appreciating his ability to understand the questions posed and the meaning and consequences of his responses; therefore it “miscalibrated” how much pressure would be necessary in order for the resulting confession to be involuntary. According to the State, the police did not try to exploit any mental impairment Hoppe had, and, therefore, the statement is admissible since Hoppe could understand the questions posed, and the meaning and consequences of his responses.

¶37 In analyzing the degree of Hoppe's mental impairment, the State offers an interpretation of the interviews whereby Hoppe rationally and deliberately denied involvement in Simon's death until confronted in the third interview with the evidence that she was dead on Friday. While the State acknowledges the opinions of the medical professionals that Hoppe's inconsistent responses were indicative of short-term memory impairment and confabulation, the State advocates the alternative explanation that he was intentionally fabricating. The State points to the wealth of detail in his answers as indicating that he understood the questions and the meaning of his responses. The State also points to the accuracy of Hoppe's answers on a number of points as an indication that he was lucid and therefore capable of rational choice.

¶38 We view a portion of the State's argument to be, in essence, a challenge to the factual findings of the court. In accepting the opinions and testimony of the medical personnel, the court found Hoppe suffered from short-term memory loss, delirium, and disorientation, was susceptible to suggestion, and was not capable of consenting to being questioned or withdrawing his consent during the time period of these three interviews. The court also accepted the testimony of his former wife that Hoppe was hallucinating when she visited him. It is the trial court's role to decide whether or not to accept the testimony of these witnesses, and its findings on Hoppe's mental and physical condition, based on this testimony and on the tapes and transcripts, is not clearly erroneous. Given the trial court's findings on Hoppe's condition, the question is not whether contrary findings could have been made, but whether, in view of the findings the court did make on Hoppe's condition, the pressure brought to bear on him by the police was such as to exceed his ability to resist. *See Clappes*, 136 Wis. 2d at 236.

¶39 In its analysis of the police conduct, the State emphasizes the court’s findings that the police did not engage in certain egregious type of behavior, Captain Manthey appeared to be very helpful to Hoppe, and the tone of the questioning was not harsh. However, while the court did make these findings, it also correctly understood that, depending on the condition of Hoppe and the circumstances of the questioning, those findings did not necessarily resolve the issue. The tapes and transcripts support the trial court’s findings that the tone of the interviews became increasingly accusatory; that the police used psychological pressures which also increased with each interview; that certain impairments of Hoppe were obvious to the questioners—for example, Hoppe’s inability to understand certain questions and remember certain events, his dozing off, his relating events in detail as happening on Friday night and Saturday that Captain Manthey recognized happened, but not at those times. The record also supports the court’s finding that the officers failed to make inquiries regarding Hoppe’s capacity to be questioned. And we agree with the trial court that it is appropriate to consider the aggregate time of the interviews, and that five hours was not brief.

¶40 The State may be suggesting that we must first look at the police tactics and, because they are not egregious or obviously coercive, we must conclude Hoppe’s confession was voluntary. However, we have already rejected that argument in *Xiong*. There we stated: “If it is the State’s assertion that the absence of obviously coercive police tactics negates the need to consider the characteristics of the person giving his or her consent, we disagree with it.” *Xiong*, 178 Wis. 2d at 534. We also stated “... that overt acts are not the sole criterion of coerciveness. If there is evidence that police are taking subtle advantage of a person’s personal characteristics, that may be a form of coercion.” *Id.*

¶41 We conclude that, considering the totality of the circumstances and balancing Hoppe's mental and physical condition, as found by the trial court, against the police conduct in questioning him, as found by the trial court, the pressures brought to bear on him by the officers exceeded his ability to resist, resulting in a confession that was not the product of a free and unconstrained will, and did not reflect deliberateness of choice.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

